Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

No. 91-2038

In the

Supreme Court of the United States

October Term, 1991

James Arthur "Art" Pope, *et al.*,
Appellants,

v.

Daniel T. Blue, Jr., *et al.*,
Appellees.

Appeal from the United States District Court for the Western District of North Carolina Charlotte Division

MOTION TO AFFIRM

LACY H. THORNBURG
North Carolina Attorney General

Edwin M. Speas, Jr., Senior Deputy Attorney General
H. Jefferson Powell, Special Counsel to Attorney General
Norma S. Harrell*, Special Deputy Attorney General
Daniel F. McLawhorn, Special Deputy Attorney General
Tiare B. Smiley, Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919)733-3786

**Counsel of Record*

QUESTIONS PRESENTED

1. Did appellants state a claim that North Carolina's Congressional Redistricting Plan violates the Equal Protection Clause on the grounds of irrationality?

2. Does article I, section 2 only proscribe districts of unequal population?

3. Did the district court properly dismiss appellants' claims based on the first amendment rights of political association and petition?

4. Did the district court properly dismiss appellants' claim based on the Fourteenth Amendment's Privileges and Immunities Clause?

This page intentionally left blank.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

MOTION TO AFFIRM 1

STATEMENT OF THE CASE 1

ARGUMENT 8

I. APPELLANTS FAILED TO STATE A CLAIM THAT NORTH CAROLINA'S CONGRESSIONAL REDISTRICTING PLAN VIOLATES THE EQUAL PROTECTION CLAUSE ON THE GROUNDS OF IRRATIONALITY 9

A. The Rational-Basis Test 9

B. The Rational Basis For North Carolina's Plan 10

C. Allegations of Partisan Motivation 13

D. Notions of Compactness and Contiguity 14

1. Contiguity 15

2. Compactness 17

E. Fair and Effective Representation 19

F. Conclusion 20

II. ARTICLE I, SECTION 2 ONLY PROSCRIBES DISTRICTS OF UNEQUAL POPULATION 21

III. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' CLAIMS BASED ON THE FIRST AMENDMENT RIGHTS OF POLITICAL ASSOCIATION AND PETITION 22

IV. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' CLAIM BASED ON THE FOURTEENTH AMENDMENT'S PRIVILEGES AND IMMUNITIES CLAUSE 24

CONCLUSION 25

APPENDIX 1a

PORTION OF TRANSCRIPT OF HEARING ON APPELLEES' MOTION TO DISMISS BEFORE THE HONORABLE W. EARL BRITT, THE HONORABLE SAM J. ERVIN, III AND THE HONORABLE ROBERT D. POTTER ON MARCH 9, 1992

TABLE OF AUTHORITIES

CASES: Page

Anne Arundel County v. State Administrative Board of Election Laws, 781 F. Supp. 394 (D. Md. 1991), *aff'd mem.*, ___ U.S. ___, 112 S. Ct. 2269 (1992) 21-23

Arizonans for Fair Representation v. Symington, No. CIV-92-256-PHX-SMM (D. Ariz. May 5, 1992) . 16

Badham v. March Fong Eu, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989) 19, 22, 23

Baker v. Carr, 369 U.S. 186 (1962) 13, 20

Bandemer v. Davis, 603 F. Supp. 1479 (S.D. Ind. 1984) 9, 19

Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989) 19

Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982) 16, 17

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) 10

City of Dallas v. Stanglin, 490 U.S. 19 (1989) 10

Connor v. Finch, 431 U.S. 407 (1977) 17

Davis v. Bandemer, 478 U.S. 109 (1986) 4, 14, 20

DeGrandy v. Wetherell, No. TCA 92-40015-WS (N.D. Fla. May 29, 1992) 17, 18

Gaffney v. Cummings, 412 U.S. 735 (1973) 14, 18-21

Gregory v. Ashcroft, ___ U.S. ___, 111 S. Ct. 2395 (1991) 10, 13

Gurley v. Rhoden, 421 U.S. 200 (1975) 25

Hastert v. State Board of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) 17, 18

Karcher v. Daggett, 462 U.S. 725 (1983) 12, 14

Mahan v. Howell, 410 U.S. 315 (1973) 21

Reynolds v. Sims, 377 U.S. 533 (1964) 13, 19

Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729 (1990) 5

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) 11, 18

Vance v. Bradley, 440 U.S. 93 (1979) 10

Wayte v. United States, 470 U.S. 598 (1985) 24

Wells v. Rockefeller, 311 F. Supp. 48 (S.D.N.Y.), *aff'd*, 398 U.S. 901 (1970) 16

White v. Weiser, 412 U.S. 783 (1973) 12, 16

CONSTITUTIONAL PROVISIONS:

U.S. CONST. art. I, § 2 . . . . . 5, 21, 22

U.S. CONST. art. IV 24

U.S. CONST. amend. I 5, 23

U.S. CONST. amend. XIV 4, 5, 24

STATUTES:

42 U.S.C. § 1973c [§ 5 of the Voting Rights Act] 11

FED. R. CIV. P. 12(b)(6) 1, 5, 19

SUP. CT. R. 15 5

OTHER AUTHORITIES:

Daniel D. Polsby & Robert D. Popper,
The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale L. & Pol. Rev. 301 (1991) . . 15

This page intentionally left blank.

No. 91-2038

In the

Supreme Court of the United States

October Term, 1991

James Arthur "Art" Pope, *et al.*,
Appellants,

v.

Daniel T. Blue, Jr., *et al.*,
Appellees.

Appeal from the United States District Court for the Western District of North Carolina Charlotte Division

MOTION TO AFFIRM

The appellees move the Court to affirm the judgment of the three-judge United States District Court for the Western District of North Carolina on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

In this appeal, appellants seek review of the order of a three-judge court dismissing their complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The complaint

challenges the Congressional Redistricting Plan enacted by the General Assembly of North Carolina, effective for the 1992 primaries and elections, alleging an unconstitutional gerrymander to protect incumbent Democratic members of Congress and further alleging that the irregularly-shaped districts fracture communities of interest so as to deprive voters of their rights under various provisions of the Constitution.

The complaint, which included a motion for temporary restraining order and preliminary and permanent injunctions, was filed on February 28, 1992. On that date, Judge Robert Potter, United States District Judge for the Western District of North Carolina, entered a temporary restraining order directing the appellee North Carolina State Board of Elections to extend the deadline for filing notice of candidacy for election to the United States House of Representatives from March 2, 1992, until March 10, 1992. In the same order, the court directed the parties to appear on March 9, 1992, to determine whether good cause existed for the court to issue a preliminary injunction.

On March 2, 1992, appellees moved to dismiss the complaint for failure to state a claim upon which relief can be granted and also moved to consolidate the hearing on the motion to dismiss with the hearing on the motion for a preliminary injunction. Appellants subsequently consented to the consolidation of the two motions for hearing. App. at 4a-5a, 20a.[1] On March 3, 1992, Judge Potter allowed appellants' request for expedited discovery, which required appellees to provide voluminous redistricting documents to appellants and

---

[1] References to the Appendix to this Motion to Affirm will be designated "App. at ___."

permitted appellants to take depositions of members of the staff to the North Carolina General Assembly and aides to United States Representatives from North Carolina.

The three-judge court appointed to hear the case, consisting of Chief Judge Sam J. Ervin, III, of the United States Court of Appeals for the Fourth Circuit; Judge W. Earl Britt of the United States District Court for the Eastern District of North Carolina; and Judge Potter, convened the hearing of this case on March 9, 1992. At the commencement of the proceedings, the court informed the parties that it would first deal with the motion to dismiss, "which we will treat as a strict 12(b)(6) motion which of course means we will not examine or get into any documentation or any supporting papers." App. at 1a-2a. When appellants insisted that they should be allowed to offer into evidence additional materials or evidence supplementing their complaint, the court offered appellants the opportunity to amend their complaint. The appellants declined to offer any proposed amendments. App. at 3a-5a.

After hearing all arguments on the motion to dismiss, the court recessed to consider the motion. Upon reconvening, the court offered the parties an opportunity for final comments. The appellants made a one-sentence plea that the case go on, but neither offered any amendment to their complaint nor asked the court to allow them to amend if the court found the complaint defective. App. at 17a. The court then announced its decision in open court, granting the appellees' motion to dismiss and dismissing the case.

The court's order and judgment were filed on April 16, 1992. In an opinion by Judge Ervin, which was joined by

Judge Britt, the court rejected appellants' political gerrymandering claim holding that the complaint does not state a viable equal protection claim as outlined by this Court in *Davis v. Bandemer*, 478 U.S. 109 (1986). The court found that the appellants had not, and under the facts of this case could not, meet the requirements of *Bandemer* for showing discriminatory *effect*, *i.e.*, appellants could not show that they have been or will be consistently denied participation in the entire political process. Jurisdictional Statement Appendix (hereinafter "J.S. App.") at 6a-11a.

Curiously, appellants assert in their Statement of The Case that the district court "erroneously" concluded that the "gravamen of the plaintiffs' case" was a *Bandemer* political gerrymandering claim and that the court "completely disregarded appellants' actual claim" that a rationality test under the Fourteenth Amendment is the appropriate standard to evaluate the constitutionality of North Carolina's Congressional Redistricting Plan. Jurisdictional Statement (hereinafter "J.S.") at p. 11. But it was the appellants themselves who stressed the importance of *Bandemer* to their case. The complaint is replete with allegations about the political control and domination of the North Carolina Democratic Party and the purposeful protection of Democratic incumbents in the redistricting process. *See*, *e.g.*, Complaint ¶¶ 54, 57-58, 62, 64, 76-77, 81-82, 85, 91, J.S. App. at 37a-46a. In addition, more than half of appellants' oral argument on the motion to dismiss concerned appellants' equal protection claim under a *Bandemer* theory: "I think we have a *Bandemer* theory. And under that theory, I believe we have to allege that there's been partisan intent. That there's been some effect and that there's been an exclusion from the

process." App. at 5a-6a. *See also* App. at 6a-14a, 16a.[2] The district court did not mistake the legal theory of the appellants' complaint; instead, the court carefully addressed and rejected as legally insufficient every allegation and claim advanced by appellants.[3]

More curiously, appellants seek review of the district court's decision to dismiss their complaint for failure to state a claim for relief, but repeatedly stray beyond the allegations of their complaint in an effort to marshall facts sufficient to avoid dismissal.[4] Pursuant to Rule 15, Supreme Court Rules, these extra-complaint allegations are catalogued below.

1. Appendix D to the Jurisdictional Statement is labelled by appellants as the "Complaint and Selected Exhibits to the Complaint." The complaint itself references Exhibits 1 - 5 and describes these particular exhibits. Complaint ¶¶ 63, 67-

---

[2] Judge Potter, who dissented from the majority opinion, agreed with the majority that appellants were presenting a *Bandemer* claim: he indicated the appellants should have been allowed to present evidence on this claim since in his view the complaint contained "sufficient allegations of both discriminatory intent and effect" to withstand a Rule 12(b)(6) motion to dismiss. J.S. App. at 16a. *See also* App. at 9a-10a.

[3] The district court also rejected appellants' claims under Article I, section 2, J.S. App. at 11a-12a, the speech and petition clauses of the First Amendment, J.S. App. at 12a-14a, and the Fourteenth Amendment Privileges and Immunities Clause, J.S. App. at 14a-15a, concluding that none of these arguments had any merit.

[4] The question whether the complaint is sufficient to withstand a motion to dismiss is limited to a review of the allegations of the complant. For this purpose well-pleaded allegations of the complaint are assumed to be true. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, ___ n. 1, 110 S. Ct. 2729, 2732 n. 1 (1990).

69, J.S. App. at 40a-41a. However, in Appendix D, Complaint Exhibits 2 - 5 have been relabelled or renumbered as Exhibits 1 - 4. This renumbering or relabelling of exhibits would in itself be unremarkable, except that Appendix D contains two so-called Exhibits 5 and 6, which were not exhibits referenced in the complaint,[5] were not attached to the complaint, and were not filed as exhibits or attachments to the complaint. The Exhibit 5 contained in Appendix D is a Declaration by James Arthur "Art" Pope, a Republican member of the North Carolina House of Representatives and a plaintiff in this action. J.S. App. at 148a-150a. The Exhibit 6 contained in Appendix D is the affidavit of Andrew C. Wright, Political Director for the North Carolina Republican Party. The Wright affidavit had attached to it numerous newspaper articles "collected" by Mr. Wright as part of his "responsibilities," of which twelve were selected by appellants for their "Exhibit 6." J.S. App. at 151a-179a. The Pope and Wright affidavits were filed in the district court at the same time the complaint was filed. However, since they are not referenced in or part of the complaint, they can only be considered in support of appellants' motions for a temporary restraining order and a preliminary injunction. These extra-complaint exhibits are referenced extensively by appellants in the Jurisdictional Statement at pages 4-5.

2. Appellants' Statement of the Case contains a number of references to materials obviously not included in the complaint. One sentence begins, "[i]n the period of expedited

---

[5] The complaint indicates that Exhibit 5 is a copy of the February 6, 1992, letter from the Department of Justice which precleared the North Carolina Congressional Redistricting Plan. Complaint ¶ 68, J.S. App. at 41a. There is no reference to an Exhibit 6 in the complaint.

discovery, appellants found," and then references allegations about John Merritt and the National Committee for an Effective Congress. J.S. at p. 5. However, there is no allegation anywhere in the complaint about Mr. Merritt or the Committee.

3. Appendix E to the Jurisdictional Statement is identified by appellants as "Selected Exhibits to the Motion for Preliminary Injunction." Clearly, none of these materials were before the district court in ruling on the motion to dismiss, but are referenced throughout the Jurisdictional Statement. *See, e.g.*, J.S. at pp. 6 n. 4, 7 n. 7, 21, 28 & n. 26.

4. Appellants' Appendix F, J.S. App. at 207a-222a, consists of a set of maps of the North Carolina Congressional Redistricting Plan which were never before the district court on the motion to dismiss. In the Statement of the Case, appellants explain that these maps were produced using computerized data obtained from the Legislative Services Office of the North Carolina General Assembly. J.S. at p. 7 n. 6. These maps are then used by appellants to support various statements, including allegations of "single point" contiguity, which are not supported by allegations in any paragraphs of the complaint.[6]

5. In arguing for a constitutional standard of contiguity, appellants assert the "facts alleged about Chapter 7 indicate that several districts are lacking in contiguity." J.S. at

---

[6] Appellants assert that "[i]n Iredell County, the twelfth district intersects at a single 'point' with two other districts, at which point the twelfth district 'crosses over' the other two districts and is 'contiguous' at best by a 'point' it shares in common with two other districts". In support of this allegation, appellants reference the maps in Appendix E, J.S. App. at 207a, 213a, 219a, 221a. J.S. at pp. 8-9.

ST AVAILABLE COPY

p. 17. Appellants reference Complaint ¶ 79, but that paragraph does not allege noncontiguity; instead it only criticizes the width of the Twelfth District in some places. J.S. App. at 43a. Similarly, appellants' only other allegation concerning contiguity simply asserts that the First District includes an unpopulated area "to purport to make the district contiguous." Complaint ¶ 82, J.S. App. at 44a.[7]

6. In support of their compactness argument in this Court, the appellants recite a litany of materials they contend they were prepared to offer as evidence in support of their theory. J.S. at pp. 21-22.[8] In addition, in a detailed footnote, appellants set forth the contents of a memorandum from the Director of Legislative Drafting for the North Carolina General Assembly to the Department of Justice regarding criticisms of the first congressional redistricting plan passed by the General Assembly. J.S. at p. 22 n. 21. This memorandum, however, was not before the district court on the motion to dismiss and its inclusion in appellants' Jurisdictional Statement is improper.

ARGUMENT

The case presents no substantial question not previously decided by this court. For the reasons stated below the court

---

[7] Appellants attempted to make this same argument about noncontiguity to the district court. However, they were closely examined by the court concerning the absence of such allegations in the complaint. App. at 14a-15a.

[8] The court's rejection of evidence beyond the allegations of the complaint in considering the motion to dismiss was reconfirmed when appellants attempted to offer evidence after the court issued its ruling dismissing the case. App. at 17a-21a.

properly dismissed the complaint in this cause and its decision should be summarily affirmed.

I. APPELLANTS FAILED TO STATE A CLAIM THAT NORTH CAROLINA'S CONGRESSIONAL REDISTRICTING PLAN VIOLATES THE EQUAL PROTECTION CLAUSE ON THE GROUNDS OF IRRATIONALITY.

Appellants ask this Court to note probable jurisdiction of their appeal on the representation that the complaint adequately states an equal protection claim asserting the invalidity of the North Carolina Congressional Redistricting Plan on the grounds of its irrationality. Contrary to appellants' claims, when the complaint is analyzed under established equal protection principles, it is clear that the decision of the three-judge court below should be summarily affirmed.

A. The Rational-Basis Test.

Appellants have essentially abandoned any reliance on this Court's decision in *Davis v. Bandemer*. Instead they describe the "appropriate standard to measure North Carolina's congressional redistricting" as "a rationality test." J.S. at p. 15. Under the well-established principles of equal protection rational-basis scrutiny, the appellants' own allegations demonstrate the validity of the state's redistricting plan.[9]

---

[9] Perplexingly, what appellants now depict as their principal claim -- that the plan is unconstitutional because it fails the rationality test and subsidiary tests of compactness and contiguity -- is not immediately evident from a reading of the complaint. Those allegations which touch upon the concepts of rationality, (continued...)

The basic principles of rational-basis analysis have often been stated by this Court. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Classifications reviewed under a rational-basis test need not be made with perfection and are not invalid merely because they result in some inequality. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). This "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). "[C]ourts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws" under the rational-basis test. *Gregory v. Ashcroft*, ___ U.S. ___, ___, 111 S. Ct. 2395, 2406 (1991), quoting from *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

B. The Rational Basis For North Carolina's Plan.

Appellants assert that the complaint alleges that the redistricting plan under review was enacted for an illegitimate purpose. In fact, in their complaint, appellants themselves attributed two perfectly legitimate state goals to the North

---

[9](...continued)
compactness and contiguity appear to be supportive of claims of political gerrymandering and unconstitutional fracturing of communities of interest rather than vice-versa. *See generally* Complaint ¶¶ 73-94, J.S. App. at 41a-47a. However, assuming *arguendo* that the complaint in fact includes a rationality claim, that claim must still be reviewed in light of the specific allegations contained within the complaint.

Carolina legislature as the primary purposes underlying the Congressional Redistricting Plan. "The General Assembly's purpose in enacting Chapter 7 was to create two districts in which black voters could elect two candidates of their choice without risking the reelection chances of white incumbent Democratic Congressmen." Complaint ¶ 76, J.S. App. at 42a.

It cannot be gainsaid that the state's purpose of enacting two minority districts was legitimate under the Equal Protection Clause. The United States Department of Justice objected under § 5 of the Voting Rights Act to the state's initial plan because it contained only one minority district. *See* Complaint ¶ 67, J.S. App. at 40a; *see also* J.S. App. at 59a-60a. The state reasonably chose to adopt a plan with two minority districts rather than undertake the difficult and time-consuming process of bringing suit in the United States District Court for the District of Columbia. The creation of minority districts to comply with § 5 objections has been upheld by this Court as a legitimate justification for the drawing of districts challenged under the Equal Protection Clause. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

The alleged state goal of preserving districts for incumbents is equally legitimate, notwithstanding appellants' efforts to paint it as improper.[10] The Court has recognized as legitimate a state's efforts "to promote 'constituency-representative relations,' a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their

---

[10] Although not explicit in the complaint, it is a matter of public record that the plan in fact places all incumbents, Republicans as well as Democrats, in separate districts.

constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives." *White v. Weiser*, 412 U.S. 783, 791 (1973). Indeed, the Court has suggested that a legislative policy of "avoiding contests between incumbent Representatives" might justify deviations from the ideal population of congressional districts. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). A policy of sufficient legitimacy to justify some deviation from the strict population equality mandated by article I, section 2 of the Constitution is certainly a legitimate policy for the North Carolina General Assembly to consider in adopting its equipopulous plan.

Appellants thus have alleged that the North Carolina Congressional Redistricting Plan was enacted for legitimate purposes. Taking appellants' arguments at face value, they have pled themselves out of court. They do not even intimate that the adopted plan is inconsistent with the goals they attribute to the legislature. Nor is it significant that the same goals allegedly could have been accomplished with a different plan that would be more palatable to appellants.[11] Under a rational-basis test, legislation need not be drawn precisely to accomplish the goals which it is apparently designed to achieve. Only if the legislature could not even conceivably have thought this plan would accomplish the legitimate purposes attributed to

---

[11] North Carolina in fact vigorously disputed the contention that it was possible to create a plan which would contain two minority districts and which would be composed of districts drawn with the nicety urged by appellants. However, since the allegations of the complaint are accepted as true for the purposes of a motion to dismiss, appellees treat them as true for purposes of this argument.

it would the plan be invalid under such a test. *Cf. Gregory v. Ashcroft*, ___ U.S. at ___, 111 S. Ct. at 2406-07. Appellants have never even hinted that the North Carolina Congressional Redistricting Plan fails to further any goals which the state could conceivably have sought to achieve through the plan.[12] Instead, the thrust of their entire complaint is that, to their chagrin, the plan succeeds.

C. Allegations of Partisan Motivation.

Appellants also allege that the North Carolina legislature had "[a] secondary purpose . . . to further dilute the influence of Republican voters state-wide by packing them into" two districts and gerrymandering them from another district, all of which are currently represented by Republican Congressmen. Complaint ¶ 76, J.S. App. at 42a. Although they now abandon their *Bandemer* claim, appellants argue that the plan is unconstitutional because what they describe as "overriding considerations of partisan affiliation and incumbency protection are not the sort of legitimate state policy" encompassed within a rational-basis analysis. J.S. at p. 15. Having abandoned their

---

[12] It is exactly such a failure to further the purported goals presented by states as grounds for deviating from meaningful standards of equal population which underlies two comments seized upon by appellants as apparent justification for their position. In Justice Clark's view, the Tennessee plan considered in *Baker v. Carr* was "a crazy quilt without rational basis" because it bore no relation to any rational policy and did not further the goals of the policy offered as justification. *See* 369 U.S. 186, 254-58 (1962) (Clark, J., concurring). Similarly, *Reynolds v. Sims* described Alabama's legislative plan as "crazy quilts, completely lacking in rationality," which "could be found invalid on that basis alone" because the plan was illogical even under the state's theory of county representation. *See* 377 U.S. 533, 568 & n. 45 (1964).

failed *Bandemer* claim, appellants should not be allowed to "sneak in the back door." Their suggestion that partisan gerrymandering somehow invalidates an otherwise constitutional plan is merely a disingenuous attempt to evade the rigorous standards established in *Bandemer* for evaluating partisan gerrymandering claims.[13] In fact, as this Court has often acknowledged, "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *accord*, *Bandemer*, 478 U.S. at 128. "[A]pportionment is a political process. . . ." *Karcher v. Daggett*, 462 U.S. at 739. In an inherently political process, partisan considerations should be recognized as legitimate unless they violate the strict standards governing partisan gerrymandering and vote dilution set out in *Bandemer*. Regardless, a secondary partisan motive in an inherently political process cannot somehow strip the North Carolina Congressional Redistricting Plan of its rational basis in view of the undeniably legitimate primary motives furthered by the plan according to appellants' own allegations.

D. Notions of Compactness and Contiguity.

Straining the allegations of their complaint and principles of constitutional law to the limits, appellants invite this Court to note probable jurisdiction because of their contentions of the arguable noncontiguity and relative noncompactness of North Carolina's congressional districts.

---

[13] Appellants were unable to meet the *Bandemer* standards and in effect pled themselves out of court by alleging the substantial state-wide success of Republican candidates in North Carolina since the 1970's. Complaint ¶¶ 55-56, J.S. App. at 37a-38a.

The Court should reject their implicit invitation to promulgate standards of contiguity and compactness as freestanding constitutional criteria which can invalidate an otherwise rational plan.

1. Contiguity.

Whatever constitutional restraints may exist on noncontiguous districts, appellants have appealed from the dismissal of a complaint which does not allege that North Carolina's congressional districts are noncontiguous. Instead, the complaint alleges that the Twelfth District is contiguous in one place "only because it runs along a railroad right-of-way" and is no wider in places than the Interstate 85 "corridor." Complaint ¶ 79, J.S. App. at 43a. The complaint also alleges that the First District is contiguous in one place only by inclusion of uninhabited parts of two precincts. Complaint ¶ 82, J.S. App. at 44a. Having failed to allege noncontiguity, appellants are in no position to urge the Court to review this case as one raising a specter of congressional districts constructed from "10, 50 or even 100 noncontiguous pieces of geography." J.S. at p. 18.

Contiguity *per se* has never been identified as a constitutional requirement. Indeed, two "experts" cited by appellants for their comments on the importance of contiguity and compactness, J.S. at pp. 18-19 n. 17, candidly acknowledge that their theory is not supported by current law and that the Court "has never said that a district must be composed of contiguous areas." Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol. Rev. 301,

330 (1991). Nor, of course, has this Court required that contiguity be established at some particular level. In fact, the Court has upheld a decision in which a highway bridge was deemed sufficient to establish contiguity. *Wells v. Rockefeller*, 311 F. Supp. 48 (S.D.N.Y.)(three-judge court), *aff'd*, 398 U.S. 901 (1970).[14] There is thus no inherent unconstitutionality in a plan which includes districts made contiguous at points through the use of uninhabited areas or a railroad right-of-way. Nor does the use of such areas to achieve contiguity detract from the demonstrated rationality of the plan, as established in the allegations of the complaint. If it was error for a district court choosing among three plans to select one on the basis that it was "significantly more compact and contiguous" than another plan, which more closely followed legislative policy choices, it cannot be unconstitutional for a state to choose a "less contiguous" plan which more closely achieves its goals over unidentified, and perhaps nonexistent, alternative plans which might be "more contiguous". *See White v. Weiser*, 412 U.S. at 796-97. The Court should reject appellants' plea for establishment of a constitutional test based on degrees of contiguity.

---

[14] Similarly, appellants cite a case in which a court-drawn plan contained a district, one part of which was connected to another only by a highway. *Arizonans for Fair Representation v. Symington*, No. CIV-92-256-PHX-SMM, slip. op. at 12 n. 4 (D. Ariz. May 5, 1992)(three-judge court). Another case relied on by appellants followed a contiguity standard simply forbidding one part of a district from being *completely* separated from another. *Carstens v. Lamm*, 543 F. Supp. 68, 88 (D. Colo. 1982) (three-judge court).

2. Compactness.

Appellants also suggest that the Court should declare a constitutional principle which would require courts to place redistricting plans under some sort of constitutional microscope solely because of alleged noncompactness. Here, too, appellants' argument does not rest on relevant authority. *Connor v. Finch*, 431 U.S. 407 (1977), which appellants cite, is inapposite: the decision concerned the standards for court-drawn plans and did not elevate relative compactness into a freestanding constitutional limitation on an otherwise valid congressional redistricting plan.

Appellants' reliance on lower-court cases considering compactness as well as contiguity in designing or selecting court-ordered plans is misplaced. For example, *Carstens v. Lamm* described compactness and contiguity as the *least* significant of the "non-constitutional" criteria it considered in selecting a congressional plan for Colorado. 543 F. Supp. at 82, 87. *DeGrandy v. Wetherell* recognized that compactness is not simply a matter of the size and shape of a district, as appellants would have it. Instead, compactness in minority districts is more a function of the size and relative concentration of the minority population. No. TCA 92-40015-WS, Slip op. at 17-18 (N.D. Fla. May 29, 1992) (three-judge court). The *DeGrandy* court consequently approved the placement of minorities living in separate "enclaves" in a single district if they share a community of interests. *Id.* at 18. *See also Hastert v. State Board of Elections*, 777 F. Supp. 634, 64[illegible] (N.D. Ill. 1991) (three-judge court).

Appellants' complaints about the noncompactness and irregular shapes of North Carolina's congressional districts ignore the foundation on which the plan was built -- the creation of two minority districts.[15] Such districts are often irregularly-shaped even when drawn or adopted by courts. Thus, a minority district in the court plan adopted in *DeGrandy v. Wetherell* was described by a critic as "grotesquely" shaped, slip op. at 30, and by one of the panel members as having the "appearance of something lifted from a Rorschach test" and "wander[ing], web-like, from south of Orlando throughout northeast Florida." Slip op., Vinson, J., concurring, at 1. In *Hastert*, the court distinguished the kind of "uncouthness" in district shapes which ordinarily signals that something else is amiss from "uncouthness" resulting from the location of minority populations; in such instances, the "uncouthness" reflects the satisfaction of constitutional and statutory goals, not their violation. 777 F. Supp. at 650.

This Court has never held that states must create compact and attractively-shaped districts. *See Gaffney v.*

---

[15] Appellants' concept of compactness, which they link to their criticism of the splitting of political subdivisions and geographic communities of interest, overlooks the fact that districts may be bound together by other kinds of geographic, economic and social interests. The problem with appellants' narrow view is that communities of interest as such have never been accorded constitutional stature, as is evident from the Court's treatment of Hasidic Jews' objection to the splitting of their community in the drawing of minority districts. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (also dismissed on a Rule 12(b)(6) motion). North Carolina's Congressional Redistricting Plan, by creating one minority district in the rural eastern portion of the state and one urban "I-85" district along the historically recognized Piedmont Crescent, reflects adherence to social, economic, political and geographic ties comprising their own communities of interest.

Cummings, 412 U.S. at 752 n. 18. Even the district court findings in *Bandemer* of "unusual" and "often contorted" district shapes which "do not adhere to any remote definition of compactness," 603 F. Supp. 1479, 1487-88 (S.D. Ind. 1984), did not require consideration of the district shapes in assessing the sufficiency of the plaintiffs' political gerrymandering claim. 478 U.S. at 142 & n. 20. Similarly, allegations of "bizarre ar irregular shapes" did not permit plaintiffs to survive a motion to dismiss under Rule 12(b)(6) in *Badham v. March Fong Eu*, 694 F. Supp. 664, 671 (N.D. Cal. 1988)(three-judge court), *aff'd mem.*, 488 U.S. 1024 (1989). Noncompact and irregularly-shaped districts have never been held constitutionally invalid in and of themselves. There is even less reason to hold such districts constitutionally invalid when they stem from an effort to comply with constitutional and statutory obligations of fairness to racial minorities in districting. The Court should decline to note probable jurisdiction on the basis of appellants' theory of a constitutional mandate for compact and regularly-shaped districts.

E. Fair and Effective Representation.

Appellants rely heavily on this Court's statement that "the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment. . . ." *Reynolds v. Sims*, 377 U.S. at 565-66; *see* J.S. at pp. i, 14, 16, 17. But the "fair and effective representation" of which *Reynolds* spoke was tied to the notion of "substantial equality of populations among districts." *Gaffney v. Cummings*, 412 U.S. at 748; *accord*, *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 694 (1989). The Court has never suggested that "fair and effective representation" can be

considered in a vacuum. Instead, the Court has insisted on "judicially discoverable and manageable standards" in order to remove challenges to redistricting plans from the nonjusticiable political question arena. *Baker v. Carr*, 369 U.S. at 217; *accord*, *Bandemer*, 478 U.S. at 122-23. Appellants no longer seek to have their complaint measured against *Bandemer's* standards for political gerrymandering claims, and their own allegations contradict any assertion that the plan "reflects no policy, but simply arbitrary and capricious action." *Baker v. Carr*, 369 U.S. at 226; *accord*, *Bandemer*, 478 U.S. at 122.

F. Conclusion.

Since appellants have apparently chosen to base their appeal on the notion that congressional districting plans must be rational in relationship to legitimate state purposes, the success of their claim for this Court's attention must rise or fall on the extent to which they have presented the Court with a complaint which adequately poses this issue. Their claim fails because appellants themselves demonstrated in their complaint a rational basis and legitimate state purposes to support the state's Congressional Redistricting Plan. If, in the alternative, appellants mean to argue for an amorphous principle of abstract rationality, including freestanding constitutional requirements for contiguity and compactness, their theory is at most only marginally reflected in their complaint. Furthermore, it is a theory which would "mak[e] the standards of reapportionment so difficult to satisfy that the reapportionment task [would be] recurringly removed from legislative hands and performed by federal courts . . . ." *Gaffney v. Cummings*, 412 U.S. at 749. Such an approach "virtually guarantees that a federal court, in a sort of judicial receivership, will ultimately conduct

redistricting -- a process the . . . Court has consistently recognized as political." *Anne Arundel County v. State Administrative Board of Election Laws*, 781 F. Supp. 394, 399 (D. Md. 1991) (three-judge court), *aff'd mem.*, ___ U.S. ___, 112 S. Ct. 2269 (1992). The Court should neither ignore appellants' own recognition of the rational underpinnings of the North Carolina Congressional Redistricting Plan nor accept their implicit plea for the Court to bog itself down in a "vast, intractable apportionment slough" of abstract notions of rationality, compactness and contiguity. *See Gaffney v. Cummings*, 412 U.S. at 749-50. Consequently, appellants have raised no sustantial question in their rationality argument, and the Court should summarily affirm the judgment below.

II. ARTICLE I, SECTION 2 ONLY PROSCRIBES DISTRICTS OF UNEQUAL POPULATION.

The appellants ask this Court to note probable jurisdiction of the question: "[d]id the district court err in holding that article I, section 2 can only be the basis of a claim of unequal population among congressional districts." J.S. at pp. i, 24. The district court followed long-established precedents in dismissing appellants' article I, section 2 claim, which relies on a theory of irrationality rather than unequal population.

Article I, section 2 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Under prior decisions of this Court, this provision has been construed solely as an equal population requirement. *Mahan v. Howell*, 410 U.S. 315, 322 (1973). In *Badham v. March Fong*

Eu, the three-judge district court dismissed the plaintiffs' article I, section 2 claim, premised on a political inequality theory not unlike appellants' claim, on the grounds that this "Court has made it clear that Article I, Section 2 only proscribes districts of unequal population." 694 F. Supp. at 674. This Court recently reconfirmed the limited scope of article I, section 2 by its summary affirmance in *Anne Arundel County v. State Administrative Board of Election Laws*, which rejected a claim that political considerations in the congressional redistricting process are constitutionally proscribed by article I, section 2. 781 F. Supp. at 397-98.

Appellants advance no reasons why this Court should expand the scope of article I, section 2's equal population requirement. In light of the recent memorandum affirmances by this Court of the *Badham* and *Anne Arundel County* decisions, no legitimate reasons exist for revisiting this issue. Appellants do not challenge the population equality of North Carolina's Congressional Redistricting Plan in this action, and the district court properly held that appellants failed to state a cause of action under article I, section 2 of the Constitution.

III. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' CLAIMS BASED ON THE FIRST AMENDMENT RIGHTS OF POLITICAL ASSOCIATION AND PETITION.

Appellants maintain that the district court erred by dismissing their case without allowing them to demonstrate that "bizarre district configurations have such a chilling effect on voters' rights as to 'inhibit participation in the political process.'" J.S. at p. 25. The district court correctly concluded

that appellants' complaint failed to state a cause of action under the First Amendment.

This Court recently has affirmed two decisions squarely rejecting similar arguments. In *Badham v. March Fong Eu*, a political gerrymandering case charging "uncouth, irregular and bizarre configurations" of congressional districts, 694 F. Supp. at 670, the court rejected a first amendment claim almost identical to that made by appellants in the present action.

> Plaintiffs here are not prevented from fielding candidates or from voting for the candidate of their choice. The First Amendment guarantees the right to participate in the political process; it does not guarantee political success.

Id. at 675. In *Anne Arundel County v. State Administrative Board of Election Laws*, 781 F. Supp. at 401, the court also rejected an almost identical first amendment claim because, despite the fact that the county had been split into four separate congressional districts allegedly for political reasons, the plaintiffs remained "free to join pre-existing political committees, form new ones, or use whatever means are at their disposal to influence the opinions of their congressional representatives." The court below properly rejected appellants' "chilling effect" argument, applying the reasoning of the *Badham* court which described an identical argument as "wholly without merit." 694 F. Supp. at 675; J.S. App. at 12a-13a.

Appellants also contest the district court's dismissal of their claim under the Petition Clause of the First Amendment, asserting that the "right of petition is not subsumed by the rest

of the First Amendment." J.S. at p. 25. However, appellants' right to petition argument was properly dismissed by the district court because it is merely a restatement of appellants' freedom of association argument and does not allege that the redistricting plan burdens the right of petition differently from its effect on other first amendment rights. J.S. at pp. 13a-14a. This Court has previously observed in a petition clause case that where a plaintiff "does not argue that [the challenged law] burdened each right differently, we view these clauses as essentially the same." *Wayte v. United States*, 470 U.S. 598, 610 n. 1 (1985).

Appellants' first amendment contentions present this Court with no basis for noting probable jurisdiction in this case.

IV. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' CLAIM BASED ON THE FOURTEENTH AMENDMENT'S PRIVILEGES AND IMMUNITIES CLAUSE.

Appellants assert that their complaint states a cause of action under the Privileges and Immunities Clause of the Fourteenth Amendment, stating that the North Carolina redistricting plan "places plaintiffs at an electoral disadvantage not suffered by voters in other states with more rational districts." J.S. at p. 28. This argument fundamentally misreads the first section of the Fourteenth Amendment. Unlike the Privileges and Immunities Clause of Article IV, section 1 of the Fourteenth Amendment does not address differences between states. The Privileges and Immunities Clause, like the rest of section 1, prohibits certain state actions regardless of what other states may do. Even if true, appellants' claim that voters in other states enjoy a "better" scheme of congressional districting

would be entirely irrelevant.[16]

CONCLUSION

Wherefore, appellees respectfully submit that the questions upon which this case depends are so unsubstantial as not to need further argument. Appellees therefore respectfully move the Court to affirm summarily the judgment entered in the cause by the three-judge United States District Court for the Western District of North Carolina.

---

[16] Confronted with a similar claim that an equal protection claim can be stated by noting discrepancies among different states' legal classifications, this Court termed the argument "patently frivolous." *Gurley v. Rhoden*, 421 U.S. 200, 212 (1975).

Respectfully submitted,

LACY H. THORNBURG
North Carolina Attorney General

Edwin M. Speas, Jr.
Senior Deputy Attorney General

H. Jefferson Powell
Special Counsel to the Attorney General

Norma S. Harrell*
Special Deputy Attorney General

Daniel F. McLawhorn
Special Deputy Attorney General

Tiare B. Smiley
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 733-3786

July 22, 1992

*Counsel of Record

APPENDIX

This page intentionally left blank.

PORTIONS OF TRANSCRIPT OF HEARING ON APPELLEES' MOTION TO DISMISS BEFORE THE HONORABLE W. EARL BRITT, THE HONORABLE SAM J. ERVIN III, AND THE HONORABLE ROBERT D. POTTER MARCH 9, 1992

[CAPTION OMITTED]

[2] JUDGE ERVIN: For the benefit of counsel, the Court has decided that we will proceed in this fashion. We will first deal with the Motion to Dismiss which we will treat as a strict 12(b)(6) motion which of course means we will not examine or get into any documentation or any supporting papers. We will simply consider the question of whether in considering the complaint as a complaint whether it under Rule 12(b)(6) states a claim upon which relief should be granted or not. After hearing that portion of the argument, we will recess and confer and depending upon our decision we will then advise counsel as to the procedure that we will follow thereafter.

* * *

[32] JUDGE ERVIN: Mr. Farr, we'll be glad to hear from you, sir.

MR. FARR: Your Honor, may I put one of these maps up on the tripod?

JUDGE ERVIN: Yes, sir. I have not seen the original complaint and the copy that I got did not have any attachments to it. Although I assume there was a map attached to the complaint. I wanted to be sure we were staying within our 12(b)(6) bounds.

JUDGE ERVIN: Was a map not necessarily this map, but a map comparable to this attached to the complaint?

JUDGE POTTER: There were xerox copies, weren't

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

there, Mr. Farr?

MR. FARR: Yes, Your Honor. Your Honor, I have to confess there are so many things that have been filed I'm confused as to what was attached to what. But I believe the map was attached to the complaint.

JUDGE ERVIN: The reason I'm raising this question is because a copy of the complaint that I got which admittedly came by FAX doesn't have anything attached to it. Unless Judge Britt has one here. That's fine, there's one here.

JUDGE POTTER: Just wanted to be sure it was in the complaint.

* * *

MR. FARR: **[34]** We brought this suit, Your Honors, because we believe--we almost feel like that I can sit down right now and just point to that map and say that we've stated a claim under some constitutional theory and that's why this suit was brought, Your Honors. Our firm took this on on a pro bono basis. We've not been paid one dime by anybody so far for the work we've done. We don't want any medals for it. We think it's our public duty to bring cases like this in front of the Court. There were lots of folks all over the state who are questioning the constitutionality or the wisdom of this plan. Nobody else looked like they were going to challenge it and we got into it. Three weeks ago, Your Honor, I was getting done trying a case that I'd worked about a week and a half being involved in. I had no prior involvement in any of the debate that went on with redistricting. Nobody in our firm had any prior involvement in any debate that went on with redistricting. What we've learned about this case is what we've learned within the last two to three weeks. And, Your Honors, the one thing that concerns me a great deal is that we do not have the

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

advantage of knowing the Record the way the state's attorneys do. And I'm concerned, Your Honors, about not being able to argue the facts at this point in time. We would be prepared to argue the facts if we're going to get thrown out of Court and ask **[35]** that our complaint would be amended to include the facts that we've discovered in the last week. We've had one week's worth of discovery. Some of the things that we know now are different than what we knew one week ago. In that regard, Your Honors, I would like permission to submit a few more things at this point in time into the Record if that would be permissible.

JUDGE ERVIN: I don't see any point in doing that at this particular point until we finish with the 12(b)(6) motion and then, of course, we'll be receptive to anything anybody wants to offer us.

MR. FARR: Your Honors, I guess as a point of clarification will we be permitted to offer this material before the Court rules on the 12(b)(6) motion?

JUDGE ERVIN: What relevance could it have to a 12(b)(6) motion?

MR. FARR: Your Honor, I believe under the federal rules if I'm not mistaken that a plaintiff has a right to amend its pleadings as a matter of right before a responsive pleading is filed. And as I said, Your Honor, we knew absolutely nothing and that's not an overstatement about any of this until two and a half weeks ago. And I think we've discovered some things . . .

JUDGE ERVIN: . . . I misunderstood what you were saying. Are you saying that you would like to offer to the **[36]** Court amendments to the complaint? I thought you said you wanted to offer additional materials or evidence.

MR. FARR: Your Honors, we would like to offer the additional materials because we believe that the materials

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

would support amendments to the complaint if we'd missed something.

JUDGE BRITT: Procedurally, how can we consider that unless you have made a motion to amend the complaint and it would be relevant to the motion to amend, Mr. Farr?

MR. FARR: If we get to that point, Your Honors, then we'd like to have permission to submit those materials and move that our complaint be amended before the Court rules on the 12(b)(6) motion.

JUDGE BRITT: Where is your amendment?

MR. FARR: We make it today, Your Honor, in open Court.

JUDGE ERVIN: What would you like to amend it to say?

MR. FARR: Your Honors, we would like for the Court to have a full factual background, as full as this thing has been developed, Your Honors. Because let me say this--

JUDGE ERVIN: It seems to me we're going back and forth between two different animals. If you're asking for permission to amend your complaint, then I would suggest you tender to the Court what proposed amendment you would like to make. We'll show it to your adversaries and see if they have **[37]** any response to it. That's one thing and that would be appropriate I think at the 12(b)(6) stage. On the other hand documentation, other evidence, when we are only looking at the face of the complaint it seems to me at this point is not appropriate. If you want to hand up a proposed amendment, we'll certainly be glad to consider it and we'll consider it before we pass upon the 12(b)(6) motion.

MR. FARR: Just as a point of clarification, Your Honor, this hearing was originally set to be heard on the plaintiffs' motion for a preliminary injunction and the

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

plaintiffs consented to having the 12(b)(6) motion consolidated with that motion based upon the thought that we would have an opportunity to argue our preliminary injunction motion. And, Your Honors, the facts of this case are so important because I think--we will admit that we are in uncharted waters here to a certain extent.

JUDGE ERVIN: If the facts are alleged in your present complaint, then we accept those facts as being true. If they're not in your present complaint, then they are not appropriate it seems to me on a 12(b)(6) motion.

JUDGE BRITT: We might add that the reason we decided to hear the 12(b)(6) motion first before hearing the preliminary injunction motion is that obviously if we were to be inclined to grant the 12(b)(6) motion, there would be absolutely no sense in hearing a motion for injunctive relief **[38]** regardless of which order we might have heard them.

MR. FARR: I understand the Court's position, Your Honors, and I would just ask that at some point in time that we be given the opportunity to submit this additional information so it's in the Record. And I believe the Record is clear that we the plaintiffs at least think that given the history of this case and the amount of time that we've had to figure out what's going on that this additional information would be relevant to a 12(b)(6) motion. I understand the Court's position.

JUDGE ERVIN: The Davis case which seems to me like too many of those things we on the appellate level do has a little something in it for everybody. What is as you vision it, what is the minimum that you have to allege in order to allege what to use a term out of the case invidious political gerrymandering to exist?

MR. FARR: Your Honor, I'll try to respond to that as best I can. I think as I understand this case, Your Honor,

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

I think we've got two separate theories. I think things can be broken into two different categories. I think that we have the Bandemer theory. And under that theory, I believe we have to allege that there's been partisan intent. That there's been some effect and that there's been an exclusion from the process. I think that there's no question that the complaint has alleged partisan intent. That there's been a **[39]** dilutive effect and, Your Honors, the exclusion from the process prong I think is something that's different. This is a new feature of this case we will admit that. Republicans have been able to elect people in state-wide elections. There's no question about that. However, Your Honors, what we have alleged is that Republicans as a group have been excluded from the redistricting process. And that's where we think we come into Bandemer, Your Honors. In the Badham case, for example, I believe that's dealing with the state of California where I believe the governor has the veto. In this situation, Your Honors, no matter how many times a Republican governor is elected in the state of North Carolina, he does not have the veto.

JUDGE BRITT: Has any Democratic governor ever had veto power?

MR. FARR: No, Your Honor, that's true. But we have alleged that the reason why the Democratic majority in the General Assembly has consistently refused to even let the people of this state vote on whether the governor should have a veto is in order to keep control of redistricting.

JUDGE BRITT: Let me see if I understand you correctly. It's your contention that you meet the exclusion from the process prong by showing exclusion from the process of creating the districts?

MR. FARR: Yes, Your Honor.

[40] JUDGE BRITT: And not in the participation in

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

the political process as a group after the districts have been created.

MR. FARR: Your Honor, I think as the Republican party, yes. I think exclusion from the political process, Your Honors, I think you can say that individuals, individual Republicans who are represented in this case--and we're representing different groups of people, Your Honors. We've got Republican individuals. We've got the Republican party. We've got Democrats. I think they're all entitled to assert whatever claims they may have. If we could go into the facts, Your Honors, I think that we could show you that the state in a previous submission to the Justice Department defending the original plan that was enacted agreed that there was a significant state interest in having compact districts and avoiding the split precincts. And we believe that people who are living in split precincts who've had those precincts split we believe for illegitimate motives that they are being excluded from the political process. And there's a submission from the state, Your Honor, they argued these very points. It will make organizing more difficult at the precinct level. It's going to cause confusion at the precinct level. It's going to make voter registration more difficult at the precinct level. So as to those individuals, we believe they are being excluded from **[41]** the political process because these lines have been drawn strictly to protect incumbent candidates, primarily Democratic incumbent candidates and for partisan and political reasons. That's our argument on Bandemer, Your Honors.

JUDGE POTTER: Mr. Farr, you allege. Let's go down to your complaint in paragraph 77. "The plan adopted by the General Assembly ignores the directive of the United States Department of Justice to create a minority district in

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

the southeastern portion of North Carolina since any such district would jeopardize the reelection of the Honorable Charles Rose, a Democratic incumbent for the Seventh Congressional District." You consider that as being an intentional discrimination against the Republican Party? Is that right?

MR. FARR: Your Honor, that's just part of it. Yes, I would agree that it is. You know there's some clarification that I could give you about that if the Court is interested because it's some of the things we've learned since we began discovery in this case. But, yes, I would agree that that's an allegation of intentional discrimination against the Republican Party.

JUDGE POTTER: Then you go on in the next paragraph and talk about the grossly contorted districts of the proposed Twelfth District saying that "one of the two [42] districts in which the General Assembly intended that black voters would be able to elect a candidate of their choice since blacks comprise 56% of the population in the Twelfth District." Then you go on and point out "the Twelfth District is approximately 160 miles long and winds through Alamance, Davidson, Durham, Forsyth, Gaston, Guilford, Iredell, Mecklenburg, Orange and Rowan Counties. It snakes along the interstate and at some points is no wider than the interstate itself and that portions of five counties in the Twelfth Congressional District, Forsyth, Guilford, Iredell, Mecklenburg, and Rowan have been split into three separate Congressional Districts. Similarly, the town of Davidson and the city of Charlotte have been split into three separate Congressional Districts." That's your allegation for what purpose? To show that there was intentional--

MR. FARR: Your Honor, we believe that those lines were drawn the way they were--first of all, Your Honor, we

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

believe that there's blame to go around on all sides in this case. But for the plaintiffs, the Democrats had control of the General Assembly and we believe that those lines were drawn specifically to enhance the electoral opportunities of Democratic incumbent Congressmen.

JUDGE ERVIN: What case can you cite me that says that's unconstitutional motive?

MR. FARR: Your Honor, under the Bandemer theory **[43]** which we're discussing at this point in time I can't under Bandemer--I believe that this is a new factual situation that's distinguishable from other cases that have been addressed by the Supreme Court. And again I go back to the point that no matter how many times Republicans elect a governor, they are never going--and have never had any impact on the redistricting of the General Assembly which draws the Congressional districts and of course they've had no impact on the Congressional district.

* * *

[46] JUDGE POTTER: Mr. Farr, your complaint--does it allege these things. Does it allege that, first of all, the Republican Party is a salient class, politically salient class. Does it allege that?

MR. FARR: Yes, Your Honor.

JUDGE POTTER: Does it allege that the relevant district or districts in the state as a whole their proportion of voting influence has been adversely affected by the challenged scheme?

MR. FARR: Yes, Your Honor.

JUDGE POTTER: Does it allege that it raises a rebuttable presumption of discrimination?

MR. FARR: Yes, Your Honor.

JUDGE POTTER: We're not here to discuss the veto of the governor. We're here to discuss whether or not your

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

complaint alleges sufficient--makes sufficient allegations for us to go forward any further than the Motion to Dismiss.

MR. FARR: We've alleged the thing about the veto, Your Honor, in the complaint.

JUDGE BRITT: You say you rely on the Bandemer case, I assume you're talking about Davis v. Bandemer.

[47] MR. FARR: No, Your Honor. We're relying on Bandemer. What we're saying is that the Badham case we believe is distinguishable.

JUDGE BRITT: You're relying on which case?

MR. FARR: The Davis v. Bandemer.

JUDGE BRITT: Yes.

MR. FARR: Yes, Your Honor.

JUDGE BRITT: You are relying on that?

MR. FARR: Yes, Your Honor.

JUDGE BRITT: All right. To me, it seems like the real thing that we've got a problem with in your pleadings if anything is exclusion from the process. Counsel for plaintiff has candidly admitted that you've alleged intent. There's no question about that. Now you have in response to my question a moment ago said that exclusion from the process as you envision is in the creation of the districts. Now how does that jive with what the majority opinion of Justice White says that "unconstitutional discrimination occurred only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters influence in the political process as a whole"? Do you think that squares with and supports the contention that--alleging that exclusion from the process in creating the districts in the General Assembly states a cause of action?

MR. FARR: Your Honor, I believe the Republicans who **[48]** live in the Chambersburg Precinct who have had their precincts split into three Congressional districts for

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

purposes of furthering the chances of reelection for incumbent Democratic Congressmen have been degraded.

JUDGE ERVIN: Don't these cases focus on the rights of voters and not on the rights of people running for office or political parties or anybody else?

MR. FARR: I think they should focus on the rights of voters, Your Honor. I think that there should be some focus on candidates. But I think the concern with the voters, that should be the primary concern. In responding to Judge Britt, again I think it's self evident that if you're a Republican in the Chambersburg Precinct and the long arm of the state stretches down and slices your county into about this one-block wide Congressional district to protect Democratic incumbent Congressmen, I think you have been degraded. I think that person might as well not even vote for the next eight years.

JUDGE ERVIN: What concerns me in trying to think through this and frankly I was in Court in Baltimore all last week and have not had a chance to go into this in depth in which I'd like to, but everybody who lives in a district who is in a minority is disadvantaged in that sense, isn't he or she?

MR. FARR: Your Honor, we've alleged illegitimate **[49]** motives for creating that district. Partisan gerrymandering motives for creating that district.

JUDGE BRITT: I want you to point to me if you can, Mr. Farr, any place in the complaint that there is an allegation that the devised system has or will or has consistently had an adverse impact on the class that you represent which I take it is the Republican class.

MR. FARR: Your Honor, I believe as to the Republican--as to the one theory, the Republican party theory, Republicans as a group; I think we've alleged that

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

Republicans have been consistently excluded from the redistricting process and to that extent I'm agreeing with you, Your Honor, that that is--we're trying to push the envelope of the case law and I think that this case is distinguishable from the other--the Bandemer cases because of the lack of the veto of the governor. And, Your Honor, I think it's very clear that that's what's happened. The Democratic Party has got a stranglehold on redistricting, they want to keep it that way. We've alleged that. We've alleged that Republicans have not had a chance to elect members to Congress in proportion to their voting powers in the state and I think it's alleged in the complaint. And as to the Republicans . . .

JUDGE BRITT: . . . Point that out to me, that allegation. The allegation that the Republicans have been [50] unable to elect Congressmen in relation to their voting strength.

JUDGE POTTER: Paragraph 86 he says "dilutes their ability to achieve effective representation, participation in or the promotion of legislative objectives in their behalf." Is that what you're talking about, Mr. Farr? Paragraph 86?

MR. FARR: I hope I was, Your Honor. Your Honor, I think if you look at paragraphs 57 and 58 we've alleged those facts in those paragraphs.

JUDGE POTTER: 57?

MR. FARR: Yes, Your Honors.

JUDGE BRITT: You've alleged there that the dilution against Blacks and you've also alleged in the last sentence of paragraph 58 "despite their state-wide success, the Republicans have never achieved a majority in either state house and have also been underrepresented in the number of Republicans elected to Congress." The last phrase of the last sentence I guess is what you're saying.

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

MR. FARR: Your Honor, it's the best I could think of at that point in time.

JUDGE ERVIN: Did I understand you, Mr. Farr, to say you thought that Davis v. Bandemer was distinguishable?

MR. FARR: Your Honor, only in the ways that I've already articulated and that I believe--Your Honor, I believe Republicans have no more opportunity to influence **[51]** redistricting than African Americans or Black people had an opportunity to have their vote counted in the 1960's. And I agree we're trying to take that analysis to the next level I would think and I think North Carolina is unique because of the reasons I've outlined, the lack of the veto which we have alleged has been kept from the Republican governor in order to allow the majority party to keep its stranglehold on the redistricting process. Your Honor, I think if you have no other questions about Davis v. Bandemer, I'd like to go on to the other legal theory we have.

JUDGE ERVIN: At some point, it would be helpful to me if you'd talk a little bit about the Badham case which seems to me to have some factual similarity to this one. And frankly, there's not many cases that help me very much one way or the other. There are a lot of cases with a lot of loose language. There's a lot of cases with a lot of very broad florid statements in general, but the cases that really focus on what this case is about seem to me to be very few and far between.

MR. FARR: Your Honor, I'd like to perhaps allow Mr. Hess an opportunity to talk about that, but the only thing I can tell you right now is that the difference between California and North Carolina is that the governor here does not have a veto. And we've alleged that the reason why it's been kept away from the governor is for the reasons we've **[52]** stated. And at this point in time . . .

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

JUDGE ERVIN: . . . It would be helpful if somebody could explain to me how one party has an advantage over the other when one doesn't have a veto and it's conceded that neither has the veto. I can understand how two parties if one has some means that it can and will employ against the other which the other lacks, then I can understand that disparity. But when neither party has a particular capacity or power such as the case here I gather with the veto, I have trouble understanding how it fits into this scheme.

MR. FARR: Because, Your Honor, every redistricting scheme that's every been passed for both the General Assembly and for the Congress has been passed by the Democratic majority in the General Assembly and we allege that they drafted those plans in order to unfairly enhance and dilute and cause the underrepresentation of Republicans in both the legislature and in the Congress and I think if we got into the facts . . .

JUDGE ERVIN: . . . Does what little case law there is suggest that the purpose or motive of one party to disadvantage another is not only not invidious discrimination but is part of the political process?

MR. FARR: Your Honor, as I said, I think saying that the Democrats like to do things to get the Republicans or vice versa is like saying a cat likes catnip and I agree with **[53]** that. However, the Bandemer case says that if you exclude an identifiable group from the political process for partisan reasons and it has an effect, then you've stated a justiciable claim. And I think that if we got into the facts that we've alleged that the Republicans have been excluded from the process historically, if we get into the facts of this case, Your Honor; I think there is absolutely no question that Republicans were completely excluded from the process that

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

resulted in enactment of this statute.

* * *

MR. HESS: **[68]** The plaintiffs have alleged and maintained that two very identifiable and manageable standards are contiguity or the lack thereof and **[69]** compactness. The plaintiffs have alleged and the state has not denied that this plan is not contiguous and the plaintiffs believe that the lack of contiguity or contiguity in Congressional districts or any districting for that matter is a fundamental basis for redistricting. If this Court were to hold that contiguity is not a requirement of Congressional redistricting, I think that the next step for the North Carolina General Assembly or any state legislature for that matter instead of connecting pockets of population by highways is just to avoid the highway connectors all together. Have islands of population around the state, fifty, a hundred, five hundred pieces of geography. If there's no contiguity requirement in the Constitution, then I think the single member representative structure of the House of Representatives is in considerable jeopardy.

JUDGE BRITT: Are you contending that there's an allegation of complete lack of contiguity in any district in this plan?

MR. HESS: Yes, Your Honor, we are.

JUDGE BRITT: What difference?

MR. HESS: Your Honor, we are alleging that District Twelve is not contiguous.

JUDGE BRITT: It's connected by a highway all the way, isn't it?

MR. HESS: We would argue that that does not meet any **[70]** accepted definition of contiguity. And if Your Honor--if I may refer to a map here of Iredell County representing the Sixth, the Twelfth--

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

JUDGE BRITT: Contiguousness means that one part touches another, doesn't it?

MR. HESS: Your Honor, the only part that touches here is at one point in space. It's in effect a crossover contiguity. We maintain that that sort of contiguity if allowed to be permitted is completely irrational. If that is permitted, then districts that don't touch at all would be permitted. And I think the political science community would agree with that definition of contiguity, Your Honor.

JUDGE ERVIN: You've got a much stronger argument that this isn't compact.

* * *

MR. HESS: [72] Finally, the state suggests that in terms of Bandemer v.--Davis v. Bandemer that Republican electoral successes would preclude relief either under Bandemer or the Badham case, Badham v. Eu. The plaintiffs would maintain that that is the appropriate interpretation of Bandemer. That if electoral success of any kind whether it's to Congress, the governor, the state legislature, if that is the standard of review, then Bandemer is a dead letter. I don't believe the Supreme Court of the United States engages in idle speculation. The plaintiffs in Bandemer were Democrats. The defendants were Republicans. And clearly the Court found that as between those two political parties and both political parties could score electoral successes in the state of Indiana, the Court found that as between those two parties there was a justiciable issue. The state argues that [73] the plaintiffs' argument will make hash out of the Supreme Court's decision in Bandemer. We believe that if the state's argument or interpretation of Bandemer is allowed to stand, it in fact renders Bandemer a nullity. I would be happy to answer any questions.

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

* * *

[77] (12:15 P.M., Court reconvened)

JUDGE BRITT: Anything further from the movants before the Court announces its decision?

MR. POWELL: No, Your Honor.

JUDGE BRITT: Anything from the plaintiffs?

MR. ELLIS: Your Honor please, we realize that the panel has had a novel problem to be faced with and whether compactness and contiguity mean anything is sooner or later going to have to be decided by the Courts and we feel that this certainly is a case that is ripe for that determination and we would like for it to go on. Thank you.

JUDGE BRITT: On the Defendant's Motion to Dismiss under Rule 12(b)(6) on the ground that the complaint does not state a claim upon which relief can be granted, the Motion to Dismiss is granted. The case is dismissed.

MR. FARR: Your Honor, can we address the Court?

JUDGE BRITT: Yes, sir.

MR. FARR: First of all, Your Honor, the plaintiffs would make a motion under Rule 62 with the Court to stay any judgement or orders resulting from the Court's ruling and a motion, Your Honor, to continue the temporary restraining order continuing the filing period until such time as an emergency application for an emergency injunction will be filed with the Supreme Court tomorrow until that motion can be disposed of. We make that motion pursuant to Rule 62.

[78] MR. SPEAS: Your Honor, we would strenuously oppose this. If this injunction is continued beyond today, the primaries cannot be held as scheduled and can impose irreparable harm throughout the state of North Carolina and we strenuously would oppose that.

JUDGE BRITT: Those motions and each of them are

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

denied.

MR. FARR: One other thing, Your Honor. We mentioned that there was some additional exhibits that we would like to put into the Record and I believe the Court said you would have no objection to us doing that. I don't think the state would object to us submitting these exhibits. I don't know if the Court needs to be in session for us to do that, but we would like an opportunity to do that and have them marked for the Court's records.

MR. SPEAS: Your Honor, we don't see a reason.

JUDGE BRITT: It seems to me that the decision of the panel will stand or fall on whether the complaint states a claim under Rule 12(b)(6) so I see no purpose to be served by putting in additional documentation.

MR. FARR: Your Honor, we would respectfully disagree and would like to submit those exhibits just for purposes of protecting the Record if we feel we need to do so.

JUDGE BRITT: Well, we'll deny your motion but let you put into the Record whatever documentation you wish to [79] do. But my understanding is on the basis of our ruling that it would not be considered for any purpose hereafter. So what purpose we have in doing it, I'm not quite sure.

MR. FARR: Your Honor, as you'll recall we stated that we thought given the short time frame that we had to investigate this case that we thought this evidence should have been marked and presented to the Court in opposition to the Motion to Dismiss. And again we understand the Court's ruling and are simply wishing to protect our right to argue--make that argument with the Supreme Court.

JUDGE ERVIN: Well, you can certainly give it to the reporter and I'll ask the reporter to mark showing that

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

they were offered after the Motion to Dismiss was granted and that they were not before the Court nor was any other evidence of documentation before the Court when the Court made its ruling.

MR. FARR: Your Honor, I would just have the Record reflect that the plaintiffs sought to offer these exhibits before the motion was granted. And, Your Honors, if this can be done with the Court reporter and with defense counsel present we see no need to have the Court present to do that but we'll be happy to have you stay if you'd like to do that.

JUDGE BRITT: The only thing I have trouble with when we came back out we asked both sides if they had anything further and both sides said no. And now it seems to me to be **[80]** an unusual procedure to follow what you're suggesting. All I want to do is let you identify for the Record what those documents are, but the Record will not reflect that they were offered at any time until after the Motion to Dismiss the case under Rule 12(b)(6) was granted.

MR. FARR: Your Honor, again I believe the Record will reflect that we sought to offer them before the motion was granted and we respect the Court's ruling on that.

JUDGE BRITT: We were talking I thought, Mr. Farr, about amendments to the complaint. Can't you give them to the reporter and let her mark them at this time and keep them separate. I don't see any reason in doing it here in open Court.

MR. FARR: Your Honor, one thing I would like to do in open Court is there was a correction to page 40 of the Gerry F. Cohen deposition that the state has been made aware of and we make sure that's been read into the Record. On page 40 of that deposition, line 9 . . .

JUDGE ERVIN: . . . Mr. Farr, I have trouble with this whole procedure because under 12(b)(6) the only thing

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

we can consider is the complaint and not other evidence which was available or already submitted or might have been submitted thereafter.

MR. FARR: Your Honor, again I understood that the Court said that we would have a chance to present this after **[81]** the Court's ruling. We asked to present it before the Court's ruling. We believe under the circumstances of this case, this evidence should have been considered in connection with the 12(b)(6) motion because it goes to showing with more particularity the irregularities associated with these Congressional districts and also, Your Honor, the process that was followed that resulted in the adoption of the districts. And given the fact that this process, I believe the Record will show that this act was precleared in February. Our firm became involved in this case three weeks ago and we believe this should be made a part of the Record and under these circumstances, Your Honor, we think it should have been considered on the 12(b)(6) motion. I would also point out to Your Honor the plaintiffs' motion for a preliminary injunction was filed and set for hearing in this case before a Motion to Dismiss was filed and we consented to that to the consolidation of the Motion to Dismiss based upon the assumption that we would be able to present this evidence before the Court. I don't believe the Court has seen all of the facts that relate to the plaintiffs' claims and the plaintiff could not put these facts into the complaint because we had not discovered them at the time the complaint was filed. So, Your Honor, I understand your ruling--

JUDGE ERVIN: If you could just designate what each one of the documents that you want to tender at this time is **[82]** by--if it's a deposition of John Jones identified as the deposition of John Jones, deposition of whoever else

MARCH 9, 1992 HEARING TRANSCRIPT CONT'D.

and just--

MR. FARR: That's what I'd like to do, Your Honor.

JUDGE ERVIN: I don't see any purpose in reading.

MR. FARR: The reason why I was going to read this one question and I'm not going to read anything else but the question was typed up incorrectly by the court reporter and I want to make sure that the Record reflects that whatever copies of this deposition . . .

JUDGE ERVIN: . . . Suppose you confer with Mr. Speas afterwards and make any changes in that document that you wish to make in it. It would be fine.

MR. FARR: All right. And, Your Honor, you're saying that with the cooperation of counsel for the defendants have these marked with the court reporter and they will be considered a part of the Record?

JUDGE ERVIN: All I'm saying is I will let you mark them at this time so that they may be identified for future purposes.

MR. FARR: We'd like to file them with the Court.

JUDGE ERVIN: I can't imagine that anybody will look at them hereafter, but you certainly may mark them and identify them.

MR. FARR: May they be filed with the Court, Your **[83]** Honor?

JUDGE ERVIN: They may be given to the clerk with the Record showing that you offered them after the Motion for Dismissal under 12(b)(6) was allowed.

MR. FARR: And again, Your Honor, we asked to offer them before the motion was ruled upon and I think the Record will reflect that.

JUDGE ERVIN: Whatever the Record reflects whatever it does.

MR. FARR: Thank you.